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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CLIFTON DYKES, an individual,

Plaintiff,

v.

CIRCUS CIRCUS CASINOS, INC., a
domestic corporation,

Defendant.

Case No. 2:10-cv-00327-LDG-RJJ

**DEFENDANT'S REPLY IN SUPPORT OF
MOTION ON THE PLEADINGS TO DISMISS
PLAINTIFF'S THIRD CAUSE OF ACTION**

I. INTRODUCTION

Defendant Circus Circus Casinos, Inc. ("Defendant") moved for judgment on the pleadings under Fed. R. Civ. P. 12(c) on Plaintiff Clifton Dykes' ("Plaintiff") Third Cause of Action ("Negligent Training and Supervision") because his Complaint lacks an allegation that is required to state such a claim under Nevada law: that he was the victim of actual or threatened physical harm. In his Opposition, Plaintiff does not dispute that fact. Indeed, Plaintiff concedes it and merely argues that an allegation of threatened or actual physical harm is unnecessary.

Plaintiff's argument has no merit. It is not supported by any authority. His Opposition cites to only a single district court case, *Lambey v. State of Nevada*, 2:07-cv-1268-RLH-PAL, 2008 U.S. Dist. LEXIS 51155, at *5-6 (D. Nev. July 3, 2008), and *Lambey* simply does not stand for the holding that Plaintiff attempts to attribute to it. It merely sets forth a non-exclusive list of

1 elements that can establish a negligent training and supervision claim. The defendant in that case
2 did not argue, and the court did not consider, whether the threat of physical harm or injury is a
3 necessary element of such a claim.

4 In contrast, the overwhelming authority cited in Defendant's Motion, which Plaintiff does
5 not even attempt to distinguish, directly contradicts Plaintiff's contention. That authority holds
6 that Nevada law requires at least a threat of physical harm in order to state a claim for negligent
7 training and supervision. Accordingly, because Plaintiff has conceded that he was not the victim
8 of such a threat, his Third Cause of Action fails as a matter of law and must be dismissed with
9 prejudice.
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11 **II. ARGUMENT**

12 Courts in this district – like other federal trial and appellate courts across the country –
13 have repeatedly held that to state a claim for negligent supervision and training under Nevada
14 law, a plaintiff must be able to show that he suffered or was threatened with physical harm.¹ See
15 *Hall v. Raley's*, 3:08-cv-00632-RCJ-VPC, 2010 U.S. Dist. LEXIS 727, at *25-29 (D. Nev. Jan. 6,
16 2010) (discussing Nevada law and majority view that negligent supervision, retention and hiring
17 claims require physical injury); *Houston v. Wynn Resorts*, 2:06-cv-01502-KJD-GWF, 2007 U.S.
18 Dist. LEXIS 32121, at *2 (D. Nev. May 1, 2007) ("a negligent hiring, training and supervision
19 case requires that Plaintiff suffer a physical harm or injury, not mere economic loss"); *Blanck v.*
20 *Hager*, 360 F.Supp.2d 1137, 1157 (D. Nev. 2005) (granting motion to dismiss negligent hiring
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24 ¹ The holdings in *Hall*, *Houston*, and *Blanck*, are in accord with the trend in other
25 jurisdictions to limit negligent hiring, retention and training claims to cases involving actual
26 physical injury. See, e.g., *Wolf v. Fauquier County Bd. of Supervisors*, 555 F.3d 311, 320 (4th
27 Cir. 2009) ("serious physical injury" is a required element of negligent hiring claim); *Jernigan v.*
28 *Alderwoods Group, Inc.*, 489 F. Supp. 2d 1180, 1204 (D. Or. 2007) (judgment as a matter of law
because plaintiff suffered no physical injury); *Staples v. Caremark L.L.C.*, SA-08-CV-831-XR, at
*15-17 (W.D. Tex. Oct. 29, 2009) ("negligent hiring, retention, supervision and training claims
based on a discrimination allegation cannot survive because statutory discrimination claims are
not a common law tort").

1 and retention claim because Nevada law requires physical injury); *Lopez v. UPS*, 2:04-cv-0732-
 2 JCM-GWF, 2009 U.S. Dist. LEXIS 47520 (D. Nev. Mar. 12, 2009) (granting summary judgment
 3 because no evidence of assault or physical threat); *see also Hall v. SSF, Inc.*, 112 Nev. 1384, 930
 4 P.2d 94 (1996); *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 925 P.2d 1175 (1996)
 5 (duty to investigate violent propensities of employees to prevent undue risk of harm to others).

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 7 Nonetheless, Plaintiff claims that "physical injury is not a mandatory to a claim a right for
 8 relief for Negligent Training and Supervision." [sic] Opposition 4:6-7. In making this argument,
 9 however, Plaintiff makes no effort to distinguish the above-referenced authority and essentially
 10 concedes that if the Court follows its reasoning, his Third Cause of Action for Negligent Training
 11 and Supervision fails as a matter of law because he never suffered a threat of physical injury or
 12 suffered actual physical harm at the hands of Defendant or any of its employees.

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 14 In fact, Plaintiff offers only a single case in support of his position: *Lambey v. State of*
 15 *Nevada*, 2:07-cv-1268-RLH-PAL, 2008 U.S. Dist. LEXIS 51155, at *5-6 (D. Nev. July 3, 2008).²
 16 *Lambey*, however, is inapposite. It simply does not, as asserted by plaintiff, hold that actual or
 17 threatened physical injury is not a necessary element of such a claim. *Id.* at *9-10. *Lambey*

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 23 ² Plaintiff also cites *Hall v. SSF, Inc.*, 112 Nev. 1384, 930 P.2d 94 (1996) and *Jespersen v.*
 24 *Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1195 (D. Nev. 2002), but neither case is
 25 discussed. To the extent that *Jespersen* speaks to the issue, it supports Defendant's position
 26 because it suggests that alleged discrimination is insufficient on its own to establish a negligent
 27 training and supervision claim. *See Jespersen*, 280 F. Supp. 2d at 1195. *Hall v. SSF* does not
 28 support Plaintiff's argument. Other decisions in the District of Nevada that have considered *Hall*
v. SSF concluded that its holding requires a plaintiff to allege physical harm in order to establish
 an "injury" sufficient to state a claim for negligent training and supervision. *See, e.g., Hall v.*
Raley's, 2010 U.S. Dist. LEXIS 727 at *25-29.

1 merely recites a list of factors and analyzed whether the plaintiff had adequately alleged a failure
 2 to train.³ *Id.* It does not discuss whether a threat of physical injury or touching is a necessary
 3 element or a negligent training and supervision claim. *Id.* at *9-11. Indeed, that issue was not
 4 even before the court because the defendant in *Lambey* did not raise such an argument. *Id.* at *9-
 5 10.⁴

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 7 However, even if the Court considered *Lambey* for the holding that Plaintiff attempts to
 8 attribute to it, the Court should still grant Defendant's Motion. Unlike *Lambey*, the cases cited in
 9 the Motion specifically analyze whether Nevada law requires actual or threatened physical injury,
 10 and found that Nevada law does have such a requirement. *Hall v. Raley's*, 2010 U.S. Dist. LEXIS
 11 727 at *25-29, is the most recent case in the District of Nevada that addresses the tort of negligent
 12 training and supervision in the context of an employment discrimination case, and its treatment of
 13 the issue is comprehensive. In *Hall*, the court considered whether an employment discrimination
 14 plaintiff could state a claim for negligent supervision and training. It conducted an extensive
 15 review of precedent from the Nevada Supreme Court, the District of Nevada and other federal
 16 courts across the country before it specifically held that "**physical harm is necessary for a**
 17 **negligent retention and supervision claim in Nevada.**" *Id.* at *28-29 (emphasis added).
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 20 ³ Importantly, it appears that the *Lambey* plaintiff did allege that she had been physically
 21 accosted by her supervisor. The plaintiff pleaded a claim for intentional infliction of emotional
 22 distress and the court noted that her supervisor was accused of engaging in "sexual misconduct."
 23 *Lambey*, 2008 U.S. Dist. LEXIS 51155 at *10. The opinion also references the plaintiff's
 24 allegations that her supervisor had touched her, rubbed her pants, and "put his hands beneath
 25 plaintiff's jacket and rubbed her back while making moaning sounds." *Id.* at *2-4. Accordingly,
 26 it also appears that *Lambey* is distinguishable from this case on its facts because Plaintiff has
 27 conceded he never suffered any physical contact.

28 ⁴ In fact, although Plaintiff does not cite to it, a subsequent decision in *Lambey* that was
 issued just a few weeks ago, and which found the *Lambey* plaintiff's claims deficient as a matter
 of law, makes it clear that the issue of whether the plaintiff suffered a physical injury was not
 before the court. *See Lambey v. State of Nevada*, 2:07-cv-1268-RLH-PAL, 2010 U.S. Dist.
 LEXIS 34384, at *10-12 (D. Nev. Apr. 7, 2010). The holding in *Lambey* concerned whether the
 defendant had adequately trained its staff, and such a holding is inapplicable to this case.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis LLP and that on this 7th day of May, 2010, I caused to be served a true and correct copy of the above and foregoing **DEFENDANT'S REPLY IN SUPPORT OF MOTION ON THE PLEADINGS TO DISMISS PLAINTIFF'S THIRD CAUSE OF ACTION** via the United States Mail, postage prepaid, properly addressed to the following:

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